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17 HEALTHCARE, INC., EHC FINANCIAL SERVICES,
18 L.L.C. AND EVERGREEN CALIFORNIA HEALTHCARE,
19 L.L.C.

20 UNITED STATES DISTRICT COURT
21 NORTHERN DISTRICT OF CALIFORNIA

22 Phyllis Wehlage, on her behalf and on
23 behalf of others similarly situated,

24 Plaintiff,

25 vs.

26 EmpRes Healthcare, Inc., *et al.*,

27 Defendants.

28 No. C 10-05839 CW

**DEFENDANTS EMPRES
HEALTHCARE, INC., EHC
FINANCIAL SERVICES, L.L.C.
AND EVERGREEN CALIFORNIA
HEALTHCARE, L.L.C.'S NOTICE
OF MOTION AND MOTION TO
DISMISS PURSUANT TO FED. R.
CIV. P. 12(b)(2) OR IN THE
ALTERNATIVE FED. R. CIV. P.
12(b)(6); MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT THEREOF;
DECLARATION OF DALE
PATTERSON**

Hearing Date: N/A
28 Judge: Hon. Claudia Wilken

14 This motion is and will be based on this notice of motion and attached
15 memorandum of points and authorities and declaration of Dale Patterson, all
16 pleadings and papers on file in this matter, and all other such evidence or argument
17 as may be submitted to the Court at or prior to the hearing.

Dated: June 22, 2011 MANATT, PHELPS & PHILLIPS

By: /s/ Barry S. Landsberg
Barry S. Landsberg

*Attorneys for Specially Appearing
Defendants* EMPRES HEALTHCARE,
INC., EHC FINANCIAL SERVICES,
L.L.C. AND EVERGREEN CALIFORNIA
HEALTHCARE, L.L.C.

¹ Despite the special appearance of these defendants to contest personal jurisdiction, it is settled practice for this court to deflect ruling on Rule 12(b)(2) motions pending a ruling on a potentially case-dispositive Rule 12(b)(6) motion. *See Kema, Inc. v Koperwhats*, 2010 U.S. Dist. LEXIS 90790, *26 (N.D. Cal. Sept. 1, 2010) (holding that granting of Rule 12(b)(6) motion mooted consideration of Rule 12(b)(2) motion).

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MEMORANDUM

I. INTRODUCTION

3 Plaintiff Phyllis Wehlage filed this lawsuit against the skilled nursing facility
4 in which she lived, Evergreen Lakeport Healthcare (“Evergreen Lakeport”) in
5 Lakeport, California. In her First Amended Complaint (“FAC”), Plaintiff purports
6 to add ten new plaintiffs, and to state claims against facilities that have been
7 dismissed, or which were not named in the original Complaint. However, for the
8 reasons set forth in the concurrently filed Motion to Dismiss or Strike First
9 Amended Complaint as Filed in Violation of the Court’s May 25 Order Dismissing
10 the “Evergreen Entities,” it is improper for Plaintiff to do so without filing a
11 separate action, and without properly serving the dismissed Evergreen Entities and
12 the new facility defendants. Plaintiff’s putative class action alleges that there was
13 inadequate nurse staffing at Evergreen Lakeport during a four-year class period
14 beginning November 15, 2006.

15 Plaintiff also names as defendants four entities that do not even hold licenses
16 to operate skilled nursing facilities (aka nursing homes, or “SNFs.”) These
17 defendants, which are either direct or indirect members of the licensed operating
18 companies, or are companies that provided certain limited direct and indirect
19 management and consulting services, are EmpRes Healthcare, Inc. (“EmpRes”),
20 EHC Management, L.L.C. (“EHC Management”), EHC Financial Services, L.L.C.
21 (“EHC Financial”) and Evergreen California Healthcare, L.L.C. (“Evergreen”).
22 Three of these entities, however, are citizens of the State of Washington, which are
23 not subject to personal jurisdiction in California, and hence should be dismissed
24 from this action.

25 This Court lacks personal jurisdiction over EmpRes, EHC Financial and
26 Evergreen (collectively, “Defendants”). EmpRes is a Washington corporation with
27 its principal place of business in the State of Washington. Similarly, EHC
28 Financial and Evergreen are two Washington limited liability companies, also with

1 their principal places of business in the State of Washington. None of the
 2 Defendants has any relationship with the State of California that would give rise to
 3 personal jurisdiction consistent with the established standards. As personal
 4 jurisdiction is lacking in California, the FAC as against Defendants must be
 5 dismissed pursuant to Federal Rule of Civil Procedure 12(b)(2).

6 Movants EmpRes, EHC Financial and Evergreen also join in their co-
 7 defendants' concurrently-filed motions to dismiss under Rule 12(b)(6).² Despite
 8 the special appearance of Defendants to contest personal jurisdiction, it is settled
 9 practice for this court to deflect ruling on Rule 12(b)(2) motions pending a ruling
 10 on a potentially case-dispositive Rule 12(b)(6) motion. *See Kema, Inc. v*
 11 *Koperwhats*, 2010 U.S. Dist. LEXIS 90790, *26 (N.D. Cal. Sept. 1, 2010) (holding
 12 that granting of Rule 12(b)(6) motion mooted consideration of Rule 12(b)(2)
 13 motion).

14 **II. RELEVANT FACTS**

15 Plaintiff's FAC asserts, as the sole basis for this Court's jurisdiction, that
 16 during the class period, Defendants "regularly conducted business in the State of
 17 California and – either directly or through [their] wholly-owned subsidiaries and/or
 18 affiliated companies – owned, leased, licensed, operated, administered, managed,
 19 directed, and/or controlled skilled nursing facilities in California."³ (FAC, ¶¶ 18,

20 ² A motion to dismiss pursuant to Rule 12(b)(6) is being filed concurrently by
 21 defendant Evergreen at Lakeport, L.L.C. A second motion to dismiss pursuant to
 22 Rule 12(b)(6) is also being concurrently filed by defendants EmpRes HealthCare,
 23 Inc., EHC Management, L.L.C., EHC Financial Services, L.L.C., and Evergreen
 24 California Healthcare, L.L.C. A third motion to dismiss pursuant to Rule 12(b)(6)
 25 or, in the alternative motion to strike pursuant to Rule 12(f), is being filed by all
 26 defendants. Thus, in the alternative, and without waiving any rights or their
 27 contention that personal jurisdiction is improper, Defendants hereby move for
 28 dismissal of the FAC pursuant to Rule 12(b)(6).

³ In the FAC, the "Facilities" are defined as Evergreen at Lakeport, L.L.C.,
 Evergreen at Arvin, L.L.C., Evergreen at Bakersfield, L.L.C., Evergreen at Springs
 Road, L.L.C., Evergreen at Chico, L.L.C., Evergreen at Heartwood Avenue, L.L.C.,
 Evergreen at Tracy, L.L.C., Evergreen at Gridley (SNF), L.L.C., Evergreen at
 Petaluma, L.L.C., Evergreen at Oroville, L.L.C. and Evergreen at Fullerton, L.L.C.
 (FAC, ¶ 34.) As stated previously, all entities besides Evergreen Lakeport are not
 properly before this Court for the reasons set forth in the concurrently filed Motion

1 19, 21.) Plaintiff further alleges, in general terms, that “each defendant has
 2 sufficient minimum contacts in California, or otherwise intentionally avails itself of
 3 the California market through participation in skilled nursing facilities located in
 4 California, derivation of substantial revenues from California, and other activities,
 5 so as to render the exercise of jurisdiction over it by the California courts consistent
 6 with traditional notions of fair play and substantial justice.” (FAC, ¶ 48.)

7 As to the moving Defendants, these allegations are false. The Defendants
 8 bringing this Motion, namely EmpRes, EHC Financial and Evergreen, do not
 9 license, administer, operate, manage or supervise *any* nursing homes in the State of
 10 California. No officers or employees of any of the Defendant entities make
 11 decisions regarding staffing at the Facilities. (Declaration of Dale Patterson
 12 (“Patterson Decl.”) ¶ 16.) To the contrary, each Facility is an independent
 13 Washington limited liability company, individually licensed and regulated by
 14 California’s Office of Statewide Health Planning and Development (“OSHPD”).
 15 The limited liability company membership units of the licensed operator of each
 16 Facility are owned 100% by Evergreen. (Patterson Decl. ¶ 15.)

17 **Evergreen**

18 Evergreen, which has never had any employees, is a holding company with
 19 no property other than limited liability company membership units in the subsidiary
 20 operating companies. (Patterson Decl. ¶ 12.) Evergreen does not transact or
 21 participate in business in California. (Patterson Decl. ¶ 17.) Evergreen has never
 22 maintained an office in California, does not own or possess any real or personal
 23 property and has never held any mortgages or liens in California, has never
 24 maintained a California account at any bank or depository institution, has never had
 25 a telephone listing in California, has never had officers in California, and has never
 26 incurred or paid income or property taxes in California. (Patterson Decl. ¶ 13.)

27 to Dismiss or Strike First Amended Complaint as Filed in Violation of the Court’s
 28 May 25 Order Dismissing the “Evergreen Entities”.

1 100% of the limited liability company membership units of Evergreen are owned
 2 by EmpRes. (Patterson Decl., ¶ 5.)

3 **EHC Financial**

4 EHC Financial is a management and consulting company. Its business is to
 5 provide certain limited accounting, information technology services and other
 6 specified services to EHC Management. (Patterson Decl. ¶ 6.) EHC Financial does
 7 not make sales in California, does not hold any California business licenses and
 8 does not solicit or engage in business in California. EHC Financial does not
 9 purposefully direct its business activities toward California residents nor does it
 10 specifically seek out California residents for its business. (Patterson Decl. ¶ 7.)
 11 EHC Financial maintains the EHC Management website, which provides certain
 12 information on EHC Management and the individual SNFs. (Patterson Decl. ¶ 10.)
 13 EHC Financial has never maintained an office in California, does not own or
 14 possess any real or personal property and has never held any mortgages or liens in
 15 California, has not maintained a California account at any bank or depository
 16 institution since 2002, has never had a telephone listing in California, has not had
 17 officers or employees who resided or were based in California since 2001, and has
 18 never incurred or paid income or property taxes in California. (Patterson Decl. ¶ 8.)
 19 The limited liability company membership units of EHC Financial are owned 100%
 20 by EmpRes. (Patterson Decl. ¶ 5.)

21 **EmpRes**

22 EmpRes is a holding company. It provides no services and has no
 23 employees. (Patterson Decl. ¶¶ 2, 3.) EmpRes has never maintained an office in
 24 California, does not own or possess any real or personal property and has never
 25 held any mortgages or liens in California, has never maintained a California
 26 account at any bank or depository institution and has never had a telephone listing
 27 in California, has never had officers in California. (Patterson Decl. ¶ 3.) The stock
 28 of EmpRes is owned 100% by the EmpRes Healthcare, Inc. Employee Stock

1 Ownership Trust, a Washington trust. (Patterson Decl. ¶ 4.)

2 Finally, Defendants neither have consented to jurisdiction nor have they
 3 appeared in this matter, other than for the sole limited purpose of joining in the
 4 removal of the action to federal court. (Patterson Decl. ¶ 21.)

5 **III. ARGUMENT**

6 Traditionally, a California district court may exercise jurisdiction over a
 7 defendant if the defendant: (a) is personally served while physically present in
 8 California, (b) is domiciled within the State, or (c) consents to or appears in the
 9 action. *See Burnham v. Superior Court*, 495 U.S. 604, 609 (1990); *see also Metro-*
 10 *Goldwyn-Mayer Inc. v. Grokster, Ltd.*, 243 F.Supp.2d 1073, 1082 (C.D. Cal. 2003).
 11 Based on California's long-arm statute, a district court also may exercise
 12 jurisdiction over a defendant that has sufficient minimum contacts with California.
 13 *See* Fed. R. Civ. P. 4(k)(1)(A); Cal. Code Civ. Proc. § 410.10; *International Shoe*
 14 *Co. v. Washington*, 326 U.S. 310, 316 (1945). None of these bases for personal
 15 jurisdiction exist with respect to Defendants. Accordingly, this Court should grant
 16 the instant motion and dismiss the FAC against Defendants.

17 **A. Plaintiff Bears the Burden to Prove Facts Establishing Jurisdiction**
 18 **Over Defendants.**

19 The plaintiff has the burden of establishing the court's personal jurisdiction
 20 over a defendant. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir. 2001). In
 21 response to a challenge to the existence of personal jurisdiction, the plaintiff must
 22 make a *prima facie* showing of jurisdiction based upon admissible evidence in the
 23 form of declarations and authenticated documentary evidence. *See Data Disc, Inc.*
 24 *v. Systems Technology Assoc., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Plaintiff's
 25 FAC does not set forth any specific contacts that EmpRes, EHC Financial or
 26 Evergreen have in California, nor could it do so.

1 **B. The Three Traditional Bases for Jurisdiction Are Not Present**
 2 **Here.**

3 Defendants are not subject to personal jurisdiction under any of the three
 4 traditional bases for jurisdiction: (a) personal service on persons physically present
 5 in California, (b) domicile within the State, or (c) consent to or appearance in the
 6 action. *See Burnham*, 495 U.S. at 609.

7 First, Defendants were not personally served with the summons in California
 8 in a way that conferred jurisdiction over them. As a courtesy to Plaintiff's counsel,
 9 Defendants' then counsel, Kathleen Walker, agreed to accept service on behalf of
 10 all parties named in the original Complaint, including Defendants. However, Ms.
 11 Walker sent Plaintiff's counsel a letter with the Acknowledgements of Receipt
 12 wherein she confirmed the need for Defendants to preserve any and all
 13 jurisdictional challenges, and hence Ms. Walker's acceptance of service did not
 14 waive Defendants' rights to later assert a lack of personal jurisdiction.⁴ (Patterson
 15 Decl. ¶ 20.)

16 Second, Defendants are not domiciled within California. A corporation is
 17 deemed a citizen of both the state in which it was incorporated and of the state in
 18 which it has its principal place of business. 28 U.S.C. § 1332(c)(1). Here,
 19 Defendants are a Washington corporation and two Washington limited liability
 20 companies, all with principal places of business in the State of Washington.
 21 (Patterson Decl. ¶¶ 2, 6, 11). Thus, Defendants are not domiciled in the State of
 22 California.

23 ⁴ To that end, Ms. Walker added the following language to the Acknowledgement
 24 of Receipt for Defendants: "The parties signing below do not consent to personal
 25 jurisdiction and reserve the right to contest personal jurisdiction. The parties
 26 signing below have signed the Acknowledgment of Receipt in reliance on
 27 Plaintiff's agreement that plaintiffs will not use such signing as a basis to assert
 28 personal jurisdiction over the parties." (Patterson Decl. ¶ 4, Ex. 1.) Even without
 29 Defendants' specific reservation of rights, such service would not confer personal
 30 jurisdiction on Defendants. *See Marriage of Meredith*, 129 Cal.App.3d 356, 362
 31 (1982) (a non-resident's signing of an acknowledgement of service does not confer
 32 personal jurisdiction, absent a statement on the form that, by signing the document,
 33 the defendant is submitting to the jurisdiction of California courts).

1 Third, Defendants have not consented to jurisdiction nor have they appeared
 2 in this action, other than for the limited purpose of removing the action to federal
 3 court (Patterson Decl. ¶ 21), which does not waive the defense of personal
 4 jurisdiction. *See Dielsi v. Falk*, 916 F.Supp. 985, 994 (C.D. Cal. 1996).

5 Thus, under the common law, no basis for jurisdiction exists over
 6 Defendants.

7 C. **Defendants Do Not Have Sufficient Contacts With California to**
 8 **Confer Either General or Specific Personal Jurisdiction.**

9 Since personal jurisdiction over Defendants, which are non-resident entities,
 10 does not otherwise exist, Plaintiff must show that Defendants had at least
 11 “minimum contacts” with California, such that the exercise of jurisdiction “does not
 12 offend traditional notions of fair play and substantial justice.” *Dole Food Co., Inc.*
 13 v. *Watts*, 303 F.3d 1104, 1110-11 (9th Cir. 2002) (quoting *International Shoe*, 326
 14 U.S. at 316). Under the minimum contacts test, an essential criterion is whether the
 15 “quality and nature” of the defendant’s activity is such that it is reasonable and fair
 16 to require the defendant to conduct his defense in that state. *West Corp. v. Superior*
 17 *Court (Sanford)*, 116 Cal.App.4th 1167, 1172 (2004) (citations omitted).⁵

18 Applying the minimum contacts analysis, a court may obtain either general
 19 or specific jurisdiction over a defendant. *Doe v. Unocal*, 248 F.3d at 923. As set
 20 forth below, Plaintiff cannot establish either.

21 1. **The Court’s Jurisdiction Over Parent or Subsidiary Companies**
 22 **Alone Is Insufficient to Confer Jurisdiction Over Defendants.**

23 The fact that Defendants are alleged in the FAC to be affiliated in some
 24 manner with other defendants which are subject to this Court’s jurisdiction is
 25 irrelevant to the analysis. The mere existence of a relationship between a parent

26
 27 ⁵ Where there is no applicable federal statute governing personal jurisdiction, the
 28 district court applies the law of the state in which the district court sits. *See*
Panavision Int’l, L.P. v. Toeppen, 141 F.3d 1316, 1320 (9th Cir. 1998).

1 company and its subsidiaries is *not* sufficient to establish personal jurisdiction over
 2 the parent on the basis of the subsidiaries' minimum contacts with the forum. *See*
 3 *Doe v. Unocal*, 248 F.3d at 925 (citing *Transure, Inc. v. Marsh and McLennan, Inc.*, 766 F.2d 1297, 1299 (9th Cir. 1985)); *see also Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984) (“jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary”).
 4 Furthermore, Plaintiff fails to allege facts sufficient to establish, if proven, that
 5 Defendants are alter egos of the Facilities such that the acts of the Facilities in
 6 California could confer jurisdiction on Defendants. *See Unocal*, 248 F.3d at 927.
 7

8 Thus, the Court may only consider Defendants' own minimum contacts, and
 9 not those of any subsidiary or affiliate, as a basis for exercising jurisdiction over
 10 Defendants.

11 2. The Court Lacks General Jurisdiction Over Defendants Because
 12 They Do Not Have Substantial, Continuous and Systematic
Contacts With California and Because Jurisdiction Is Not
Reasonable.

13 None of the moving Defendants is subject to general jurisdiction in
 14 California. General jurisdiction exists only when a defendant's activities in the
 15 state are “extensive or wide-ranging” or “substantial . . . continuous and
 16 systematic.” *Bancroft & Masters, Inc. v. Augusta National Inc.*, 223 F.3d 1082,
 17 1086 (9th Cir. 2000) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*,
 18 466 U.S. 408, 415 (1984)); *see also Hammond v. Monarch Investors*, 2010 U.S.
 19 Dist. LEXIS 66595, at *5 (S.D. Cal. Jul. 2, 2010) (“Unless a defendant's contacts
 20 with a forum are so substantial, continuous, and systematic that the defendant can
 21 be deemed to be ‘present’ in that forum for all purposes, a forum may exercise only
 22 ‘specific’ jurisdiction – that is, jurisdiction based on the relationship between the
 23 defendant's forum contacts and the plaintiff's claim”). In such a situation, there is a
 24 constitutionally sufficient relationship to warrant jurisdiction for all causes of action
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1 against the defendant, regardless of whether the specific cause of action is
 2 connected to the defendant's business activities in the forum. *Bancroft*, 223 F.3d at
 3 1086.

4 General jurisdiction exists where the defendant's contacts with the forum are
 5 akin to physical presence, such as when a company operates most of its
 6 administrative functions, employs most of its staff, and makes substantial purchases
 7 in the forum. *See Stone v. Advance Am. Cash Advance Centers, Inc.*, 2009 U.S.
 8 Dist. LEXIS 24762, at *11 (S.D.Cal. Mar. 20, 2009). The standard for establishing
 9 general jurisdiction is "fairly high" and requires that the defendant's contacts be of
 10 the sort that approximate physical presence. *Bancroft*, 223 F.3d at 1086.

11 The exercise of jurisdiction must also be reasonable. *Doe v. Unocal*, 248
 12 F.3d at 925. "A determination of the reasonableness of the exercise of jurisdiction
 13 in a given case involves the evaluation of several factors: the burden on the
 14 defendant, the interests of the forum state, and the plaintiff's interest in obtaining
 15 relief." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987).

16 Defendants plainly are not subject to general jurisdiction in California. A
 17 defendant subject to general jurisdiction in the State of California is one whose
 18 contacts with the forum are so substantial that they "approximate physical
 19 presence." *Bancroft*, 223 F.3d at 1086. Defendants do not even remotely maintain
 20 or approximate physical presence in California in the manner contemplated. To
 21 subject Defendants to the general jurisdiction of this Court, Plaintiff must therefore
 22 establish that Defendants personally engaged in "substantial . . . continuous and
 23 systematic" activities *within* the State of California. *Id.* She cannot do this.

24 Defendants' non-existent California "contacts" could not be classified as
 25 "substantial . . . continuous and systematic." Defendants have not (1) maintained
 26 an office in California, (2) owned or possessed any real or personal property or held
 27 any mortgages or liens in California, (3) had California accounts at any bank or
 28

1 depository institution since 2002,⁶ (4) had telephone listings in California, or (5)
 2 had officers or employees in California since 2001.⁷ (Patterson Decl. ¶¶ 3, 8, 13.)

3 In fact, Plaintiff's only basis for asserting jurisdiction over Defendants is that
 4 the collective body of various defendant entities, and certain of their subsidiaries
 5 own, lease, license, administer, operate, manage, direct or control SNFs in the State
 6 of California. (FAC, ¶¶ 18, 19, 21.) But Defendants do not license, administer,
 7 operate, manage or supervise nursing homes in the State of California. (Patterson
 8 Decl. ¶ 18.) And Evergreen's ownership of the membership units of the limited
 9 liability companies that are the licensed operators of the SNFs is not sufficient.⁸

10 The present uncontested facts, established in Mr. Patterson's
 11 accompanying declaration, make it clear that Defendants' contacts do not come
 12 close to the minimum quantum needed for general jurisdiction under controlling
 13 case law. For example, in *Bancroft*, the Ninth Circuit agreed with the district court
 14 that the defendant's contacts were insufficient to confer general jurisdiction over
 15 the defendant. *Bancroft*, 223 F.3d at 1086. The Ninth Circuit noted that the
 16 defendant was not registered or licensed to do business in California, paid no taxes
 17 in California, maintained no bank accounts in California, had no advertising
 18 targeted towards California, and maintained only a passive website (meaning
 19 consumers could not use it to make purchases). *Id.* Though the defendant
 20 occasionally sold merchandise to California residents and had license agreements
 21 with two television networks and a handful of California vendors, the Ninth Circuit

22

23 ⁶ EHC Financial has not maintained a California account in any bank or depository
 24 institution since 2002. EmpRes and Evergreen have never maintained any
 25 California accounts.

26 ⁷ EHC Financial has not had employees in California since 2001. EmpRes and
 27 Evergreen have never had officers or employees in California.

28 ⁸ As noted, the existence of a relationship between a parent company and its
 29 subsidiaries is not sufficient to establish personal jurisdiction over the parent on the
 30 basis of the subsidiaries' minimum contacts with the forum. *Doe v. Unocal*, 248
 31 F.3d at 925. Thus, the Court may only consider Defendants' minimum contacts as
 32 a basis for jurisdiction over Defendants.

1 concluded that such limited contacts with California were insufficient to establish
 2 general jurisdiction. *Id.*

3 Here, like the defendant in *Bancroft*, Defendants are not registered to do
 4 business in California⁹ and maintained no accounts here since 2002.¹⁰ (Patterson
 5 Decl. ¶¶ 3, 8, 13.) EHC Financial uses employees in Washington to maintain a
 6 passive website for EHC Management, which does not offer to sell anything online
 7 or allow California residents to register to live at any of the Facilities. The website
 8 offers general information about the Facilities, but if potential residents or family
 9 members want to ask specific questions about the Facilities or schedule a tour, they
 10 are put in contact with the specific facility itself, or perhaps with EHC
 11 Management. (Patterson Decl. ¶ 10.) Under *Bancroft*, this is not sufficient to
 12 establish general jurisdiction.

13 Likewise, in *Unocal*, the Ninth Circuit granted a defendant's motion to
 14 dismiss after determining that the defendant, Total, S.A., did not have sufficient
 15 contacts with California. Total's only alleged contacts with California were
 16 through its subsidiary holding companies. *Doe v. Unocal*, 248 F.3d at 930-31.
 17 Defendants, too, have no direct contact with the State of California. (Patterson
 18

19

20 ⁹ Qualification to do business in California does not operate to confer jurisdiction.
 21 An out-of-state corporation can "qualify" to do business in California by filing a
 22 prescribed form with the Secretary of State and paying statutory fees. *See Cal.*
 23 *Corp. Code § 2105*. As part of the "qualification" process, a foreign corporation
 24 must appoint a local agent for service of process (or consent to service on the
 25 Secretary of State, or, under the Franchise Investment Law, the Commissioner of
 26 Corporations). *See Cal. Corp. Code §§ 2105(a)(4), (5) & 31420; Cal. Ins. Code §§*
 27 *1610–1611*. This is not a consent to jurisdiction: A foreign corporation's
 28 designation of an agent for service of process in California is not a submission to
 personal jurisdiction here – *i.e.*, although service of summons may be made on the
 designated agent, the action cannot be maintained against a foreign corporation
 absent minimum contacts with California. *See Gray Line Tours of Southern*
Nevada v. Reynolds Electrical & Engineering Co., Inc., 193 Cal.App.3d 190, 193–
 194 (1987) (no personal jurisdiction found because defendant did not have
 sufficient contacts with the State of California); *Thomson v. Anderson*, 113
 Cal.App.4th 258, 270 (2003).

29 ¹⁰ *See* footnote 6.

1 Decl. ¶¶ 18, 19.) Their only connection with California is through the Facilities
 2 located there.

3 Therefore, Defendants lack the contacts in California required to establish
 4 general jurisdiction and jurisdiction is not reasonable.

5 3. The Court Lacks Specific Jurisdiction Over Defendants Because
 6 They Have Not Purposefully Availed Themselves of the
 7 Privileges of Conducting Activities in California, Plaintiff's
Claims Do Not Arise Out of Defendants' Contacts With
California, and the Exercise of Jurisdiction Is Not Reasonable.

9 Defendants also lack the contacts in California required to establish specific
 10 jurisdiction. In contrast to general jurisdiction, a court may exercise specific
 11 jurisdiction over a defendant if the cause of action itself arises out of or has a
 12 substantial connection to the defendant's contacts with California. The Ninth
 13 Circuit has applied a three-part test – and the plaintiff must demonstrate that the
 14 defendant meets each prong – to determine whether the assertion of specific
 15 jurisdiction comports with due process. *Ballard v. Savage*, 65 F.3d 1495, 1498 (9th
 16 Cir. 1995). Here, none of the three conjunctive prongs is satisfied.

17 First, to be subject to specific jurisdiction, the defendant must have taken
 18 steps to “purposefully avail” itself of the privileges of conducting activities in the
 19 forum state, thereby invoking the benefits and protections of the forum and having
 20 “fair warning” that a particular activity may subject it to jurisdiction. *Corporate*
21 Inv. Business Brokers v. Melcher, 824 F.2d 786, 788 (9th Cir. 1987). Purposeful
 22 availment is demonstrated when the defendant has taken deliberate action within
 23 the forum state or created continuing obligations to residents of the forum state.
24 Burger King v. Rudzewicz, 471 U.S. 462, 475-76 (1985). A defendant need not be
 25 physically present within the forum state, provided its efforts are purposefully
 26 directed towards forum residents. *Ballard*, 65 F.3d at 1498.

27 Second, the claim must arise out of or result from the defendant's forum-
 28 related activities. *Id.* A claim “arises out of” the defendant's forum-related

activities if the injury to the plaintiff would not have occurred “but for” the defendant’s activities. *Id.*

Third, the assertion of jurisdiction must be reasonable. *Id.* In considering reasonableness, courts balance several factors to determine whether the asserted jurisdiction comports with “fair play and substantial justice.” *Id.*

Plaintiff has the burden of establishing the first two elements. *See SDS Korea Co. v. SDS USA, Inc.*, 2010 U.S. Dist. LEXIS 80223, at *33 (S.D. Cal. Aug. 4, 2010).

a. Purposeful Availment

Plaintiff must satisfy the first prong by demonstrating that the defendant “purposefully directed” its conduct toward the forum state, or “purposefully availed” itself of the privilege of doing business in that state. *SDS Korea Co.*, 2010 U.S. Dist. LEXIS 80223, at *32. The defendant’s intent must be “to perform an actual, physical act in the real world, rather than an intent to accomplish a result or consequence of that act.” *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 806 (9th Cir. 2004).

In *Burger King*, the United States Supreme Court extensively discussed the level of “purposeful availment” that must be demonstrated before a court may constitutionally exercise personal jurisdiction over a nonresident defendant:

The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with a forum State. The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking its benefits and protections of its laws.*

Burger King, 471 U.S. at 474-75 (citing *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) (emphasis added)). The Supreme Court pointed out that the “purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction

solely as a result of “fortuitous” or “attenuated” contacts. *Id.* at 475.

“[A]bsent some form of ‘purposeful availment,’ the fact a defendant’s conduct in the forum state has some relationship to the causes of action asserted in the lawsuit, cannot, in and of itself, render jurisdiction reasonable.”” *Edmunds v. Superior Court (Ronson)*, 24 Cal.App.4th 221, 231 (1994) (citation omitted). Specific jurisdiction over a nonresident defendant requires a substantial nexus between the plaintiff’s alleged claim and the defendant’s activities *within* the state:

[T]he cause of action must arise out of an act done or transaction consummated in the forum, or defendant must perform some other act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws.

Vons Cos., Inc. v. Seabest Foods, Inc., 14 Cal.4th 434, 448 (1996), *cert. denied sub nom. Washington Restaurant Mgm't v. Vons Cos., Inc.*, 522 U.S. 808 (1997).

Defendants' conduct does not remotely rise to the requisite standard. Defendants have not purposefully availed themselves of any benefit of the laws of the State of California such that they would reasonably expect to be haled into court here. Again, Defendants have not (1) maintained an office in California, (2) owned or possessed any real or personal property or held any mortgages or liens in California, (3) had California accounts at any bank or depository institution since 2002,¹¹ (4) had telephone listings in California, or (5) had officers or employees in California since 2001.¹² (Patterson Decl. ¶¶ 3, 8, 13.) Defendants conduct no activity in California and they certainly have done nothing to *purposefully* avail themselves of California privileges by invoking this state's benefits and protections.

b. Forum-Related Activities

Plaintiff also cannot establish that her claims arise out of or result from Defendants' forum-related activities. A claim "arises out of" the defendant's

¹¹ See footnote 6.

¹² See footnote 7.

1 forum-related activities if the injury to the plaintiff would not have occurred “but
2 for” the defendant’s activities. *Ballard*, 65 F.3d at 1500. In this case, even if
3 Plaintiff had suffered an injury, and Defendants contend she did not, the claims
4 alleged in the FAC could not have occurred “but for” Defendants’ activities in
5 California, because Defendants conduct no activity in California. In addition,
6 because Defendants do not license, administer, operate, manage or supervise any
7 SNF in California (Patterson Decl. ¶¶ 18, 19), they could not be the cause of any
8 injuries alleged in the FAC.

c. Reasonableness

Finally, though the Court need not reach the third prong of the specific jurisdiction test because Plaintiff cannot establish either of the first two prongs against Defendants, specific jurisdiction over Defendants also fails under the third prong of the test because the assertion of jurisdiction over Defendants in California is not reasonable. In analyzing reasonableness, the Ninth Circuit considers seven factors:

- (1) the extent of the defendant's purposeful interjection;
- (2) the burden on the defendant of defending in the forum;
- (3) the extent of conflict with the sovereignty of the defendant's state;
- (4) the forum state's interest in adjudicating the dispute;
- (5) the most efficient judicial resolution of the controversy;
- (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and
- (7) the existence of an alternate forum.

24 | *Dole*, 303 F.3d at 1114.

25 A balancing of the factors shows that it is not reasonable to exercise
26 jurisdiction over Defendants, because Defendants have no presence in California.
27 They do not do business in California and do not have any offices or staff in
28 California. It would be a burden for Defendants to defend a lawsuit in California,

1 and there exist alternate forums where Defendants are subject to jurisdiction (for
2 example, the State of Washington, where each has its principal place of business).
3 Therefore, Plaintiff also fails to satisfy the final prong of the specific jurisdiction
4 test because jurisdiction over Defendants in California is unreasonable.

5 || IV. CONCLUSION

6 For all of the foregoing reasons, Defendants respectfully requests that the
7 Court grant their Motion to Dismiss.

9 || Dated: June 22, 2011

Respectfully submitted,

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